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17 United States of America

18 UNITED STATES DISTRICT COURT
19 SOUTHERN DISTRICT OF CALIFORNIA

20 OSWALDO ENRIQUE TOBAR, et al.,) Case No.: 3:07-cv-00817-WQH-JLB

21)
22 Plaintiffs,)

23 vs.)

24 UNITED STATES OF AMERICA)

25 Defendant.)

26) IN ADMIRALTY

27) DISCOVERY STATUS UPDATE OF

28) UNITED STATES OF AMERICA

) DATE: August 22, 2014

) TIME: 10:00 a.m.

) LOCATION: Telephonic

1 Pursuant to the Court's Minute Order [Dkt. #134], dated August 7th, and in
2 anticipation of the telephonic status conference to be held on August 22nd, the
3 United States hereby submits the following update regarding the discovery plan
4 that the parties agreed to and that the Court ordered on July 30, 2014:
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6 1. State Department Advisory on Depositions in Ecuador.
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8 By FedEx letter, the United States informed plaintiffs' counsel that Ecuador
9 is not a signatory to the Hague Convention on the Taking of Evidence Abroad in
10 Civil or Commercial Matters. Insofar as taking depositions, the United States
11 advised plaintiffs' counsel that the U.S. State Department's publicly available
12 advices on taking evidence abroad provides for a country-by-country listing of the
13 legal status for taking depositions and states, "The taking of voluntary depositions
14 of willing witnesses is not permitted in Ecuador, regardless of the nationality of the
15 witness." [See, page two of Appendix A, the United States' August 11th letter to
16 Plaintiffs' counsel.]
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20 2. Scheduling Depositions.
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22 (a) Depositions of Plaintiffs. On August 11, 2014, the United States
23 sent an amended notice of deposition for eight crewmember plaintiffs, the
24 depositions to occur in San Diego between September 16-18, 2014.
25 Accompanying the notice was the attached cover letter (Appendix A), which
26 stated, "In the spirit of professional cooperation and accommodation, we are happy
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1 to discuss different dates if these pose an irreconcilable conflict. That said, we
2 understood Magistrate Judge Burkhardt to instruct each of us to place a high
3 priority on scheduling and commencing the plaintiffs' depositions. We therefore
4 are proceeding as instructed."

6 We note that plaintiffs' counsel filed papers with the Court asserting that the
7 deponents arbitrarily have been chosen and that the San Diego venue should give
8 way to Ecuador. The United States' letter to counsel (Appendix A) explained that
9 the deponents were the JOSTIN's Master, plus the purported "owners" of the small
10 boats/pangas – one of whom (Ms. Zambrano Lucas' son, Segundo Matias
11 Zambrano Alonzo) was also identified by Mr. Tobar *and* Ms. Zambrano Lucas as
12 the business "administrator" for the JOSTIN's alleged fishing operations (neither
13 Tobar nor Zambrano Lucas professed to have knowledge of the business
14 operation).

19 Moreover, the letter explained that in addition to the fact that plaintiffs
20 subjected themselves to the jurisdiction of the United States and its courts by
21 voluntarily filing suit, the United States intends to have at least one (and likely
22 two) of its retained litigation consultants/experts at the San Diego depositions in
23 order to assist and advise counsel. The hourly fees and the separate travel costs of
24 flying the San Diego-based consultants/experts to South America (or Panama)
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1 would be prohibitive, not counting the travel costs for counsel and a U.S. court-
2 certified reporter.

3 (b) Depositions of the United States' Witnesses.
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5 Plaintiffs' counsel filed a document with the Court, stating: "The Defendant
6 has failed to produce at least five witnesses that the Plaintiffs' counsel has been
7 clamoring for for years." We respond simply and as follows: the statement is not
8 truthful. Mr. Boyaki sought the depositions of five witnesses. The United States
9 voluntarily made available CDR Geoff Owen (USCG Retired) and LCDR
10 Bertheau. Both depositions were concluded months ago. The United States also
11 had arranged dates for the voluntary appearances of LCDR Brad Kieserman
12 (USCG Retired) and LCDR Larry Ellis (USCG Retired) on dates proposed by Mr.
13 Boyaki; the latter – not the United States -- *cancelled* those depositions. As made
14 clear in Appendix A, the United States has again asked Mr. Boyaki to propose new
15 mutually convenient dates for the two deponents. We still await his response.
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20 Finally, Mr. Boyaki has stated that he wishes to take the deposition of the
21 former Ambassador to Ecuador. We have informed counsel by letter that the
22 witness will need to be subpoenaed. As a further courtesy to counsel, we also
23 provided him with advice concerning the mandatory procedures with which he will
24 need to comply concerning the witness' testimony. [See, Appendix B, letter dated
25 May 27, 2014.]
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1 3. Plaintiffs' Production of Documents.

2 On August 18th, the United States received a cover letter and 71 additional
3 pages of documents (most in Spanish and without either certified or uncertified
4 translations) which plaintiffs listed as 1) Repair bills; 2) Cost of Tuna Certification;
5 3) Report of the Captain of the Port concerning the fish and fuel; 4) Report of
6 Director General of Fisheries concerning the inspection and Condition of the
7 Jostlyn [sic] after it was seized; 5) Medical records of Mrs. Lucas; and 6) Medical
8 records of Mr. Cedenó (JOSTIN's Captain), Mr. Mero and Mr. Arteaga (both
9 JOSTIN crewmembers).

10 The United States seeks certification and clarification that these documents
11 comprise the *complete* remainder of the documents that will be provided. If they
12 are not, then we ask for a final date certain when any additional documents
13 will/must be provided. (Pursuant to the Joint Discovery Plan filed with the Court,
14 document discovery closed months ago.)

15 4. Plaintiff Rosa Zambrano Lucas will conduct additional searches and
16 provide best available color photos (of the alleged fish catch).

17 See response to #3 above. No photographs were provided with the 71 pages
18 of documents received by the United States on August 18th. Plaintiff Tobar
19 testified that he viewed such photographs at Zambrano Lucas' house.

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1 5. Documentation of medical care and other damages issues.

2 See response to #3 above.

3 6. Plaintiffs' counsel, Walter Boyaki, will identify documents relied on
4 by estimator and by Dr. Cruz, as well as other records responsive to
5 defendants first request for production of documents.

6 See response to #3 above.

7 RELATED DISCOVERY ISSUES

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9 On August 14, 2014, plaintiffs filed their "Designation of Experts" [Dkt.
10 #137], listing their Fed.R.Civ.P. 26 experts. As stated in plaintiffs' "expert
11 designation #3", plaintiffs claim to have previously produced Ms. Zambrano
12 Lucas' medical records from Cardiologist, Jose Alban Flores, M.D., but no such
13 records have been received by the United States, unless plaintiffs are referring to a
14 few pages within the 71 pages of documents referenced above. As stated above,
15 the United States seeks certification and clarification that the documents received
16 to date (79 pages previously, plus the 71 received this week) are the *only*
17 documents that will be provided. If they are not, then we ask for a date certain
18 when the remaining additional documents, if any, will be provided.

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1 Plaintiffs' "expert designation #5" states, "See attached report" of Francisco
2 Paredes, M.D. No report was attached.
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5 Dated: August 20, 2014

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17 U.S. Department of Justice

18 Attorneys for Defendant
19 United States of America
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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2014, I electronically filed the foregoing DISCOVERY STATUS UPDATE OF UNITED STATES OF AMERICA with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Walter L. Boyaki wboyaki@aol.com

Albert W. Morris awmorris16@gmail.com

/s/ Vickey L. Quinn
Vickey L. Quinn